

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

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8	UNITED STATES OF AMERICA,)	
9	Plaintiff,)	No. CV-72-3643-JLQ
10	SPOKANE TRIBE OF INDIANS,)	REPORT AND RECOMMENDATION OF
11	Plaintiff/Intervenor,)	SPECIAL MASTER REGARDING
12	v.)	FACTUAL AND LEGAL ISSUES TO
13	BARBARA J. ANDERSON, et al.,)	BE ADDRESSED BY THE PARTIES
14	Defendants.)	
15)	

On May 3, 2006, the undersigned entered an order directing the parties to further define the legal and factual issues that have been raised and require the attention of the parties and the court (Ct. Rec. 583). On June 2, 2006, the government parties responded jointly (Ct. Rec. 594). Adjudicated water rights holder Nicholas D. Pemberton filed a response to the government parties' Response, also on June 2, 2006 (Ct. Rec. 593). Specifically, Mr. Pemberton noted that certain water rights holders needed additional time to adequately respond. Accordingly, the undersigned entered an order that permitted additional time for the parties to respond (Ct. Rec. 595, entered June 5, 2006). That time now has passed and no other responses have been received.

1 The government response was submitted jointly by the Spokane
 2 Tribe of Indians, the United States Indian Resources Section of the
 3 U.S. Department of Justice, and the State of Washington Department of
 4 Ecology. The government parties represent that their draft response
 5 was transmitted to the other parties on the service list and that the
 6 following parties represented no objection to the government party
 7 response, but did not join in the response: Jackie Smartt, Patrick
 8 Sulgrove, and counsel for Dawn Mining Company. Accordingly, the only
 9 responses to the undersigned's May 3, 2006, Order are the government
 10 parties' proposal, and Mr. Pemberton's filing. The joint response
 11 sets out the view of the issues as follows:

12 1. Should the finding at page 3 of the July 23, 1979
 13 Opinion and page 4 of the August 23, 1982 Orders, that
 14 groundwater in the upper Chamokane Creek basis is
 15 "unconnected to the Chamokane drainage system," be
 16 modified? See also September 12, 1979 Judgment ("Ground
 water withdrawals in the Upper Chamokane region have no
 impact upon the flow of Chamokane Creek because groundwater
 in the Upper Chamokane region is part of a separate
 aquifer.).

17 Factual Question: Is the groundwater of the upper
 18 basin separate or connected from that of the middle and
 lower basin areas?

19 2. Are all surface and ground water uses in the middle
 20 and lower Chamokane Creek areas subject to the *U.S. v.*
Anderson orders?

21 3. Given current conditions, what level if any of uses
 22 such as "domestic" and "stock watering" should be excepted
 23 from regulation by the *U.S. v. Anderson* water master due to
 their de "minimus" effects on Chamokane Creek?

24 Factual Questions for Issues 2 and 3:

25 A. Do all surface and ground water uses in the
 26 middle and lower Chamokane areas impact flows in Chamokane
 Creek?

27 B. What are the cumulative impacts of i) claims
 28 registry use and ii) permit-exempt wells on the flow in the
 Chamokane Creek?

1 C. If there are any impacts identified in questions
2 A) and B) that are sufficiently large to affect the flows,
3 how do those impacts affect the frequency and severity of
4 regulation by the water master?

5 D. Is there a level of domestic or stockwater use
6 that is too small or difficult to regulate? If so, what is
7 that level?

8 Ct. Rec. 594 at 2-3 (footnote omitted).

9 As far as a timeline, the government party Response represents
10 that the necessary factual investigation to resolve the issues could
11 take three years, subject to federal, state and tribal funding. The
12 government parties requested that no deadline for completion be set
13 by the court, as the parties are not certain regarding the capacity
14 to complete the studies and would prefer that the progress of the
15 studies be updated at the annual special master hearing in the spring
16 of each year. It is suggested by these parties that following
17 completion of the studies, four months should be allowed to file
18 opening legal briefs, with two months for responsive briefs and one
19 month for reply briefs by any party.

20 The government parties represent they "do not anticipate that a
21 majority of the costs of the factual investigation will be borne by
22 the water users but rather by the Governmental Parties." (Ct. Rec.
23 594 at 4, lines 1-3). Mr. Pemberton's Response reflects his view
24 that any study should "include how much natural foliage around the
25 Chamokane creek is being excavated for tribal development." (Ct.
26 Rec. 593 at 2.) In addition, Mr. Pemberton's position is that the
27 non-governmental parties should not have to bear any of the costs of
28 any studies; and, rather, it is the governmental parties that should
bear the cost of the investigative funding. He states that if the

1 funding cannot be provided by the governmental parties, then the
2 investigation should be dropped.

3 As to the legal and factual issues, **IT IS RECOMMENDED** that the
4 issues be framed and styled as set forth by the governmental parties
5 and that studies undertaken include addressing the foliage excavation
6 issue raised by Mr. Pemberton. However, as to the timeline, **IT IS**
7 **RECOMMENDED** that a date certain deadline be imposed for the
8 completion of the studies, specifically, a deadline of **three years**
9 from the date of the order that addresses this Report and
10 Recommendation, subject to the parties requesting a modification of
11 that deadline, for good cause, if needed.

12 **IT IS RECOMMENDED** that the proposed dates for briefing be as
13 follows:

14 1. Opening legal briefs be filed and served no later than four
15 months following the completion of the necessary studies, and the
16 studies be filed or lodged with the court within ten days of
17 publication.

18 2. Responsive briefs be filed and served no later than two
19 months following service of the opening legal briefs.

20 3. Reply briefs, if any, one month from service of the
21 responsive briefs.

22 **IT IS RECOMMENDED** that the costs of such studies be borne by the
23 governmental parties only.

24 **OBJECTIONS**

25 Any party may object to a magistrate judge's proposed findings,
26 recommendations or report within ten (10) days following service with
27 a copy thereof. Such party shall file with the District Court

1 Executive and serve on all parties written objections, specifically
2 identifying the portions to which objection is being made, and the
3 basis therefor. Any response to the objection shall be filed within
4 ten (10) days after receipt of the objection. Attention is directed
5 to FED. R. CIV. P. 6(e), which adds another three (3) days from the
6 date of mailing if service is by mail.

7 A district judge will make a de novo determination of those
8 portions to which objection is made and may accept, reject, or modify
9 the magistrate judge's determination. The judge need not conduct a
10 new hearing or hear arguments and may consider the magistrate judge's
11 record and make an independent determination thereon. The judge may
12 also receive further evidence or recommit the matter to the
13 magistrate judge with instructions. See 28 U.S.C. § 636(b)(1)(B) and
14 (C), FED. R. CIV. P. 73, and LMR 4, Local Rules for the Eastern
15 District of Washington.

16 A magistrate judge's recommendation cannot be appealed to a
17 court of appeals; only the district judge's order or judgment can be
18 appealed.

19 The Clerk of the Court shall file this Report and Recommendation
20 and serve copies of it on Senior Judge Quackenbush, and those parties
21 listed on the most recently updated Notice List attached to this
22 Report and Recommendation.

23 DATED June 29, 2006.

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25 S/ CYNTHIA IMBROGNO
26 UNITED STATES MAGISTRATE JUDGE
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